

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT MARCEL WALTON,

Defendant-Appellant.

UNPUBLISHED

November 27, 2007

No. 273053

Wayne Circuit Court

LC No. 06-002034-01

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 12 to 25 years' imprisonment for the assault conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm in part and remand for an evidentiary hearing on defendant's claim of ineffective assistance of counsel.

I. Continuance

Defendant first argues that the trial court abused its discretion by refusing to grant him a continuance to enable him to obtain a proper independent forensic evaluation, thereby violating his constitutional right to present a defense. We disagree.

Whether a defendant has been denied the right to present a defense is a constitutional issue to be reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

In this case, defendant never moved for a continuance and the trial court did not preclude defendant from presenting an insanity defense at trial. The trial court's insistence that defendant comply with its scheduling order and obtain a timely evaluation did not infringe on defendant's constitutional right to present a defense.

II. Effective Assistance of Counsel

Next, defendant argues that he was denied the effective assistance of counsel. Although defendant did not raise this issue in a post-trial motion in the trial court, he filed a motion in this Court to remand for an evidentiary hearing on his claim that defense counsel was ineffective. This Court denied the motion "for failure to persuade the Court of the need to remand at this

time.” *People v Walton*, unpublished order of the Court of Appeals, entered May 4, 2007 (Docket No. 273053).

To establish ineffective assistance of counsel, defendant must show that counsel’s performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he has been prejudiced by the error in question, i.e., that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens, supra* at 312, 314.

Defendant first argues that defense counsel was ineffective by failing to adequately investigate and pursue an insanity defense before trial. A defense attorney is not required to pursue a meritless defense. See, e.g., *People v Lloyd*, 459 Mich 433, 449-451; 590 NW2d 738 (1999). However, “[f]ailure to make a reasonable investigation can constitute ineffective assistance of counsel,” *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), and an attorney is ineffective if he makes a serious error that deprives the defendant of a substantial defense, i.e., one that might have changed the outcome. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

In this case, the record discloses that defense counsel requested and was permitted to obtain an independent forensic examination before trial, but then failed to obtain one in a timely manner. The trial court, in fact, indicated that it had given permission for an independent psychiatric examination approximately three months prior to trial. As a result, defendant’s expert at trial, Dr. Van Horn, did not have access to all necessary records, including records that were reviewed by the prosecution’s expert, Dr. Garver, and which the forensic center had been previously ordered to make available to defendant. Defendant also complains that defense counsel failed to make sure that Dr. Van Horn understood the facts of the case. In its findings of fact, the trial court acknowledged the conflicting testimony of Dr. Van Horn and Dr. Garver, but found Dr. Garver’s testimony to be more credible and reliable, explaining:

Dr. Van Horn has not reviewed any of the defendant’s previous medical or psychiatric records, including his medical records from his release from the hospital on January 25, 2006, and she did not review his jail medical records.

Dr. Van Horn’s testimony is not persuasive because she has not reviewed [defendant’s] prior mental health records and she is not fully aware of the facts and circumstances of the crime with which defendant is charged.

It is apparent that Dr. Van Horn’s misconceptions about the facts and her failure to review defendant’s mental health records seriously hurt the credibility of her testimony in the eyes of the trial judge. Thus, defense counsel’s failure to timely obtain a forensic examination and ensure that Dr. Van Horn had the opportunity to review the necessary records and understood the facts surrounding the crime could amount to ineffective assistance of counsel. To be entitled to relief, however, defendant must also demonstrate a reasonable probability that the outcome of trial

would have been different but for counsel's deficient performance. In this case, the record does not indicate how Dr. Van Horn's opinion may have changed had she had access to the complete medical records and properly understood the facts of the case, or the effect of any renewed opinion on the trial court, as the trier of fact. Under the circumstances, we are persuaded that remand for an evidentiary hearing on whether ineffective assistance of counsel on this issue occurred and whether it was outcome determinative is appropriate. An evidentiary hearing on this issue shall be held within 60 days of the issuance of this opinion. If the ineffective assistance of counsel is found to have been outcome determinative, defendant is entitled to a new trial.

Defendant also argues that defense counsel was ineffective for failing to formally move for a continuance to secure a thorough independent forensic evaluation, for failing to call police witnesses in order to establish factual support for an argument that defendant's conduct immediately after the shooting was not inconsistent with defendant's claim of insanity, and for failing to object to the prosecutor's remarks during closing argument. Because we are remanding for an evidentiary hearing on defendant's ineffective assistance of counsel claim, defendant is free to explore these issues on remand.

III. Sentencing

Lastly, defendant argues that the trial court violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), when it increased his sentencing guidelines range on the basis of facts not found by the trier of fact. We disagree.

In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme that allowed the sentencing judge to increase a defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. As defendant concedes, our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which the defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. See *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006); see also *People v McCuller*, 479 Mich 672; ___ NW2d ___ (2007). Thus, there is no merit to this issue.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray